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AMBANK (M) BHD

v.

CA STEEL SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[ORIGINATING SUMMONS NO: 24NCVC-89-01/2012]
15 APRIL 2012

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CIVIL PROCEDURE: *Originating summons - Filing of - Charge action - Seeking order of court to sell property by way of public auction - Defendant company wound up - Whether plaintiff ought to obtain leave from winding up court before filing originating summons - Plaintiff enforcing remedy under charge - Whether proceeding barred or caught by*

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s. 226(3)(a) Companies Act 1965 - Whether provision affects power of plaintiff as secured creditor - Whether plaintiff has statutory right to commence foreclosure proceedings - Whether originating summons allowed

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The plaintiff, by originating summons (encl. 1), sought for an order of court to sell the property held under Geran 39736, Lot No. 870, Bandar Klang, Selangor ('the property') by way of public auction pursuant to ss. 256 and 257 of the National Land Code. The property had been charged to the plaintiff as security for two credit facilities, namely, an overdraft facility and a term loan facility. The defendant had defaulted the payment and settlement of the sums outstanding and thereby breached the terms of the charge. The originating summons and the affidavit was served upon the defendant on 19 January 2012. The notice of hearing of the originating summons was served on 16 February 2012. On 28 February 2012, when this originating summons came up for hearing, an officer from the Official Receiver's Office raised a preliminary objection. The preliminary objection was that since the defendant company was wound up on 18 May 2011, the plaintiff ought to have obtained leave from the winding up court, before the originating summons was filed. Thus, the originating summons was premature and ought to be struck out. In disagreeing with the contention of the Official Receiver, the plaintiff submitted that the plaintiff was only enforcing the remedy under the charge, thus no leave was required to commence this proceeding. The sole issue for consideration herein was, whether the plaintiff, being a

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secured creditor, was required to obtain leave from the winding up court as provided in s. 226(3)(a) of the Companies Act 1965 before this originating summons could be filed in court to enforce the statutory remedy under the charge against the property.

Held (allowing plaintiff's originating summons with costs):

(1) The proceeding filed in the present case was brought against the security rather than against the defendant company and should not affect the rights and powers of the secured creditor to enforce the statutory remedy under the statutory charge. Accordingly, the proceeding herein was not barred or caught by s. 226(3)(a) of the Companies Act 1965 as the provision does not apply to a secured creditor, like the plaintiff in the present case. A statutory charge under the National Land Code takes effect as a security only, and is enforceable by proceedings in court to obtain a judicial sale (*Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v. Bank Bumiputera (M) Bhd & Ors*, refd). (para 15)

(2) Section 226(3) of the Companies Act does not affect the power of any secured creditor to realise or otherwise deal with the security. The rights are protected. There is no requirement to seek the leave of the winding up court for realising the security. In other words, the secured creditor stands outside the winding up proceedings unless he himself chooses to submit to the jurisdiction of the winding up court. Thus, the said section does not bind a secured creditor and there is no bar for a secured creditor, such as the plaintiff in the present case, to enforce the statutory remedy without leave from the winding up court as the plaintiff did not institute any action or suit (*Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corp & Anor*). (para 19)

(3) In the circumstances, s. 226(3)(a) of the Companies Act had no application whatsoever to a secured creditor who has the statutory right to commence foreclosure proceedings where in the present case, the plaintiff was merely enforcing its statutory remedy. In accordance with the rules of natural justice, the preliminary objection raised on behalf of the Official Receiver was dismissed. (para 21)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals [2002] 2 CLJ 1 FC ***(refd)***

Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) [1995] 3 CLJ 316 SC ***(refd)***

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputera Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Koshi Bai & Another v. Chunilal Hathising & Orther AIR [1930] Bombay 11 ***(refd)***

Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor [2010] 9 CLJ 637 CA ***(refd)***

Nrishinha Kumar Siha v. Deb Prosanna Mukherjee & Ors AIR [1935] Col 460 ***(refd)***

Padmavathamma & Ors v. Battepati Pasthasarathi [1996] 4 Andh LT 272 ***(refd)***

Ram Chand v. Bank for Celyer India, Limited Delhi & Another [1922] Lahore 281 ***(refd)***

Re David Llyod & Company (1877) 6 Ch D. 339 ***(refd)***

Re Joint Stock Discount Company, Warrant Finance Company's case No. 2 [1870] 10 Equity 11 ***(refd)***

Re Oak Pitts Colliery Company [1882] 21 Ch. D 322 ***(refd)***

Re Perdana Merchant Bankers Bhd [1997] 1 LNS 408 HC ***(dist)***

Re Saunders (a Bankrupt) Re Bearman (a Bankrupt) [1997] 3 All ER 992 ***(refd)***

Re Wanzer Limited [1891] 1 Ch D 305 ***(refd)***

Re Your Size Fashions Ltd [1990] NZLR 727 ***(refd)***

Sowman v. David Samuel Trusts Ltd [1978] 1 All ER 616 ***(refd)***

Sri Jeluda Sdn Bhd v. Pentalink Sdn Bhd [2008] 4 CLJ 359 CA

United Overseas Bank (Malaysia) Bhd v. Andrew Lee Siew Ling [2012] 3 CLJ 708 CA ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 42

Civil Law Act 1956, ss. 4(1), 8(2A)

Companies Act 1965, ss. 223, 226(3)(a), 291(1)

National Land Code, ss. 254, 256, 257

Companies Act 1948 [UK], s. 227

For the plaintiff - Kingston Tan Teck Kiong; M/s Heiley Hassan Tan & Partners
For the defendant - Leonard Imban (Siti Wahidah Azizi with him); FCs

Reported by Suhainah Wahiduddin

JUDGMENT

VT Singham J:

[1] By the originating summons (enclosure 1), the plaintiff seeks for an order of court to sell the property held under Geran 39736, Lot No. 870, Seksyen 24, Bandar Klang, Daerah Klang, Negeri Selangor (hereinafter referred to as 'the property') by way of public auction pursuant to s. 256 and s. 257 of the National Land Code. The property has been charged to the plaintiff as security for two credit facilities, namely, an overdraft facility and a term loan facility. This originating summons is supported by an affidavit (encl. 2) affirmed on 11 January 2012 by Abdul Hakim bin Abdullah, the assistant director of the plaintiff bank. The charge was registered on 20 September 2007 at the land office. The defendant had defaulted the payment and settlement of the sums outstanding and thereby breached the terms of the charge dated 20 September 2007 with the annexure attached.

[2] By the letter dated 25 November 2011, the plaintiff's solicitors had issued a Statutory Notice of Demand (Form 16D) pursuant to s. 254 of the National Land Code where the defendant was given a prescribe period of one month from the service of the notice of demand to remedy its breach of the charge. The defendant had failed to take action to remedy the breach. The outstanding amount for the overdraft facility as at 18 May 2011 was RM355,469.63 and for the term loan facility as at 11 May 2011 was RM1,072,285.83.

[3] The originating summons and the affidavit was served upon the defendant on 19 January 2012. The notice of hearing of the originating summons which was fixed for hearing on 28 February 2012 was served on 16 February 2012. However, this court was informed that the defendant company was wound up on 18 May 2011 (Shah Alam High Court Winding Up Petition No. MT(FLJC)-28-48-2011) by the petition filed by Kuwait Finance House (Malaysia) Sdn Bhd.

[4] On 28 February 2012 when this originating summons came up for hearing before this court, En. Wan Kamal Zahari, an officer from the Official Receiver's Office had raised a preliminary objection. The preliminary objection was that since the defendant company was wound up on 18 May 2011, the plaintiff ought to have obtained leave from the winding up court, before the originating summons was filed in court. As no leave was obtained as required under s. 226(3)(a) of the Companies Act 1965 (hereinafter referred to as 'the Companies Act'), the originating summons was premature and ought to be struck out.

[5] On the other hand, in disagreeing with the contention of the Official Receiver, the learned counsel for the plaintiff had submitted that since the plaintiff was a secured creditor and that the plaintiff was only enforcing the remedy under the charge, no leave was required to commence this proceeding.

S. 226(3)(a) of the Companies Act 1965 states:

Actions stayed on winding up order.

(1) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

[6] As the preliminary objection raised on behalf of the official receiver was an issue of law, this court had directed both parties to file skeletal submissions with the authorities and adjourned the hearing to 6 March 2012. On that day, Cik Siti Wahida binti Aziz, the learned Federal Counsel from the Official Receiver's Office attended court and maintained the preliminary objection.

[7] The submissions of the official receiver is as follows:

(a) Permohonan plaintif dalam tindakan/prosiding ini tidak teratur kerana saman pemula bertarikh 11 Januari 2012 telah difailkan tanpa memperolehi kebenaran dari Mahkamah Penggulungan terlebih dahulu.

(b) Peruntukkan undang-undang jelas memperuntukkan bahawa mana-mana syarikat yang telah digulungkan ataupun pelikuidasi sementara telah dilantik, mana-mana tindakan

ataupun prosiding boleh diteruskan atau dimulakan dengan mendapatkan kebenaran dari Mahkamah Penggulungan. Dalam membenarkan kebenaran tersebut, mahkamah boleh menetapkan apa-apa terma mahupun syarat bertepatan dengan tindakan ataupun prosiding yang akan diteruskan ataupun dimulakan.

(c) Permohonan plaintif harus ditolak dengan kos oleh mahkamah.

[8] In support of the submissions, the learned Federal Counsel for the official receiver referred to the following authorities:

(1) S. 226(3) of the Companies Act 1965

(2) *Re Perdana Merchant Bankers Bhd* [1997] 1 LNS 408

[9] On the other hand, the submissions of the learned counsel for the plaintiff is as follows:

(a) The plaintiff is a secured creditor by virtue of the document of Charge.

(b) The object of the Winding up provisions is to put all unsecured creditors upon equality and to pay them *pari passu*. No creditor shall gain priority over others of his class.

(c) A company which has been put into liquidation does not affect the rights of secured creditors and does not affect the securities held by them; not until the secured creditor has been fully paid off.

(d) The secured creditor's rights are not within nor covered by the ambit and object of s. 226(3)(a) of the Companies Act 1965.

(e) There is no mandatory requirement for a secured creditor to come under liquidation for it is a sale of charged property which did not belong to the company but formed part of the chargee's security.

(f) Pray for order in terms.

[10] In support of his submissions, the learned counsel for the plaintiff has referred to the following authorities:

(1) *Sri Jeluda Sdn Bhd v. Pentalink Sdn Bhd* [2008] 4 CLJ 359

(2) *Bank Bumiputera Malaysia Bhd & Ors v. Kimlin Housing Development Sdn Bhd (in receivership)* [1993] 1 LNS 88

A (3) *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals* [2002] 2 CLJ 1

(4) *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793

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Decision

[11] Having gone through the cause papers and upon hearing and considering the submissions of both the parties and the C research carried out by this court, the decision of this court is:

[12] The sole issue for the consideration of this court is, whether the plaintiff, being a secured creditor, is required to obtain leave from the winding up court as provided in s. 226(3)(a) of the Companies Act before this originating summons is filed in court to D enforce the statutory remedy under the charge against the property.

[13] This court is of the considered view that:

E (i) no leave is required to be obtained from the winding up court by the plaintiff, a secured creditor, to enforce the statutory remedy.

(ii) The plaintiff did not commence any action, neither has the plaintiff sued the defendant for the recovery of the banking F facilities or loan granted to the defendant company.

(iii) The plaintiff has filed this originating summons to enforce the statutory remedy under the charge against the property by seeking an order of the court for the sale of the secured G property.

S. 256 of the National Land Code states:

(1) This section applies to land held under:

H (a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

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and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

S. 257 of the National Land Code states:

(1) Every order for sale made by the court under section 256 be in Form 16H and shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the date on which the order is made;

(d) required the registrar of the court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question;

(e) specify that no bidder shall be allowed to bid in the sale unless the officer of the court is satisfied that the bidder possesses, at the time of the sale, the sum equivalent to ten per centum of the reserve price specified under paragraph (d);

(f) specify that where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder, the sum specified in paragraph (e) shall be paid as deposit to the chargee and forthwith credited into the account of the chargor pending the settlement of the balance of the purchase price;

(g) specify that the balance of the purchase price shall be settled on a date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified; and

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(h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) to the chargee shall be forfeited and disposed of in the manner specified under section 267A.

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(2) Any such order may contain such other directions with respect to the sale as the court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or leases than one, direct:

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(a) that they be offered for sale individually, and in a specified order; and

(b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the registrar of the court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.

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(3) In specifying or determining any amount for the purposes of paragraph (b) of sub-section (2), the court or the registrar, as the case may be, shall have regard not only to the liability of the chargor under the charge, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

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In *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 199 the Supreme Court said at p. 122:

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> The principles governing the matter are well settled by authority and are not open to question. *A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge.*

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> The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject. In

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VRKRS Chettiappah Chetty v. Raja Abdul Rashid Ibni Almarhum Sultan Idris, the appellant (chargee) had taken a summons under s. 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated (emphasis added):

> No Member of the Royal Family of Perak (Waris Negri) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident.

Apparently no permission had been obtained as required by the Order in Council. Thorne Ag CJ in the Court of Appeal held [at p 19]:

> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
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> … I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s. 149 of the Land Code. The applicant does not commence an action or suit and does not file a complaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. The proceedings result not in a judgment or decree, but in making or refusal of an order of sale. (emphasis added)

A In *Mercantile Bank of India v. TF Egan & Marion Braddon* [1940] 9 MLJ 288, the court held at p. 289:

> What the chargees in this case seem to me to desire is to proceed as if they were executing a decree, and yet refuse to give the chargors the opportunity to show cause against sale which they would have if the order were a decree, or which they have if the application is made under section 149.
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> There has been much argument before the Registrar and before me as to whether the order of 1928 is a decree. Mr. Rintoul, for the chargors, submits that the order made on the first application in 1928 is a decree and that section 264 of the Civil Procedure Code applies. His argument is founded upon the fact that these applications are made at present on an originating summons, and that as accounts are usually taken, the proceeding is a suit and the order is a decree. Mr. Mills submitted that the order made in 1928 is not a decree, that the sale had been postponed by order of the Court with liberty to the chargees to apply and therefore he was right in applying by Summons in Chambers before the Assistant Registrar to give directions for the sale: a sale previously ordered by the Court upon a default in 1928.
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> The order is not a decree. The proceeding is not a suit. No decisions have to be taken as to whether the applicant has a charge or whether he has a power of sale, so there is no adjudication upon any substantive issue and therefore no judgment and no decree. I would describe the proceeding under section 149 as an application for the execution of a power of sale.

In *BOQ Equipment Finance Ltd v. Ship "Illusive" (Marine Registration AFJ852N) and Another* [2010] 269 WLR 579, the Supreme Court of New South Wales held that *the bank being the secured creditor, no leave was required and that the proceeding was in rem as the proceeding in rem is against the property and the proceeding was not against the company and therefore, there was no leave required.* (emphasis by this court).

However, it is important to state that there are express provision in the Australian Corporation Act, namely:

> **S. 471B: Stay of proceedings and suspension of enforcement process**
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> While a company is being wound up in insolvency or by the court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:
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> (a) a proceeding in a court against the company or in relation to property of the company; or
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> (b) enforcement process in relation to such property;
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> except with the leave of the court and in accordance with such terms (if any) as the court imposes.
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> **S. 471C: Secured creditor's rights not affected**
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> Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.
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> **500(2): Execution and civil proceedings**
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> After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court imposes.

In *American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95, Ong CJ (Malaya) said at p. 96:

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest.

In *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 MLJ 257, the Supreme Court in following the decision in *American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd* said at p. 258:

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> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.

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> We are in complete agreement with the law as expounded by the learned Chief Justice of the High Court of Malaya. (*American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95)

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In *Sharfuzzaman & Others v. H Hunter, Liquidator of Upper India, Ltd*, and another AIR (1930) Oudh 20 the court said at p. 29:

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> A secured creditor who has advantage of security may remain outside the Act. He can realize on his security. To the extent to which he realizes on his security will reduce the estate of insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should, however, the

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> amount of realization be less than the amount due to him he is given the special privilege of proving for the balance. This balance is difference between the amount owing and the amount realized. When he has proved he will not obtain anymore than his

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> proportionate share in the estate. He will be put then on the footing of an unsecured creditor.

In *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446 the Supreme Court said at p. 447:

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> the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by

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> the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. *It is for this*

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> *reason that application under section 226(3) of the Companies Act 1965 should be made inter partes so that*

> *the summons could be served on the Official Receiver who should be heard before the discretion of the Court is exercised*. Without hearing the Official Receiver the Court cannot be said to have exercised the discretion judicially. (emphasis by this court).
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> In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings. We think the learned judge had applied the correct test laid down in *Re Cuthbert Lead Smelting Co* (1886) WN 84 and we agree with him that leave should be given pursuant to section 226(3) of the Companies Act 1965 to the respondent to commence proceedings against Mosbert Berhad (In Liquidation) in respect of her claim to Private Lot No. 460 in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong in the District of Johore Baru.

[14] A secured creditor is entitled to stand aloof from the liquidation. (see *Re Your Size Fashions Ltd* [1990] NZLR 727 at p. 733). The secured creditor's status that he stands outside the liquidation and that he must be paid first in preference over other unsecured creditors remains intact. (see *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))* [1995] 3 CLJ 316 and followed in *K Balasubramanian, Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793). By implication and analogy of the two cases, s. 226(3)(a) of the Companies Act must necessarily apply only to unsecured creditors so as to place them upon an equality and to pay their debts *pari passu*. (see *Re Oak Pitts Colliery Company* [1882] 21 Ch. D 322 which is referred to in *Sri Jeluda Sdn Bhd v. Pentalink Sdn Bhd* [2008] 4 CLJ 359).

[15] Therefore, it is the considered view of this court that the proceeding which is filed in the present case is brought against the security rather than against the defendant company and shall not affect the rights and powers of the secured creditor to enforce the statutory remedy under the statutory charge. Accordingly, the proceeding in the present case is not barred or caught by s. 226(3)(a) of the Companies Act as the provision does not apply to a secured creditor, like the plaintiff in the present case. A statutory charge under the National Land Code takes effect as

A a security only, and enforceable by proceedings in court to obtain a judicial sale. (see *Kimlin Housing Development Sdn Bhd v. Bank Bumiputera Malaysia Bhd & Ors* [1997] 3 CLJ 274). In fact, the Supreme Court had referred to the case of *Sowman v. David Samuel Trusts Ltd* [1978] 1 All ER 616 where there was
B a sale of property which did not belong to the company but formed part of the debenture holder's security and therefore held it did not contravene s. 227 of the Companies Act 1948 (*pari materia* to our s. 223 of the Companies Act 1965). (see also *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other*
C *Appeals* [2002] 2 CLJ 1, *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516 at p. 532, *United Overseas Bank (Malaysia) Bhd v. Andrew Lee Siew Ling* [2012] 3 CLJ 708. However, the only legal limitation that is
D imposed upon the plaintiff is that the secured creditor must realise the security within six months of the winding up order. Otherwise the rights to impose interest is curtailed in that, the secured creditor cannot enforce the rights for the interest beyond that period. In fact, the learned counsel for the plaintiff has been
E candid and had informed this court that the plaintiff did not claim for any interest after the order of winding up against the defendant.

In *Re Perdana Merchant Bankers Bhd* [1997] 3 MLJ 435, the case
F referred and relied on by the Official Receiver's Office can be distinguished on the facts and the surrounding circumstances.

(i) In that case, there was a validation order granted by a High Court pursuant to s. 292 of the Companies Act 1965 in respect of a private sale and purchase agreement entered into
G between Campall, acting through its Directors and a third party which was made conditional upon the validation by the court of the said sale.

(ii) The validation order was granted on 7.12.1993 by the court. In consequence to the validation order and the realisation of
H the assets of Campall, there was a dispute when it came to the distribution of the assets to all its creditors and the order of priority as provided under s. 292 of the Companies Act.

(iii) As a result, the Perdana Merchant Bankers Bhd, applied to the court for various orders on the distributions of the
I assets against the liquidator. The liquidator objected to the application and had raised preliminary objection that the application was premature and that Perdana Bank's

entitlement was only to the proceeds of the sale of the secured property after deducting the proper expenses and disbursement incurred. The liquidator contended that the deposit paid pursuant to the private agreement which was forfeited and interest earned were not part of the proceed of the sale of the property and that the Perdana Bank's claim would rank *pari pasu* with the other creditors and that the liquidator was entitled to his remuneration as fixed by the Committee of Inspection.

(iv) In those circumstances, and the background facts, His Lordship Abdul Malik Ishak J (now JCA) in allowing the liquidators preliminary objection and dismissing Perdana Bank's application had held that the leave was required under s. 226(3)(a) of the Companies Act and that the application was premature.

[16] However, as stated above, the present originating summons which was filed by the plaintiff-chargee is to seek an order of court to enforce the statutory right and remedy against the charge. Therefore, it is the respectful view of this court that the reasons given, the facts and the surrounding circumstances in *Re Perdana Merchant Bankers Bhd* can be easily distinguished as summarised above and poles apart when compared to this straight forward application by the plaintiff in the present case. (see *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 3 CLJ 785 for duties of a liquidator).

[17] Be that as it may, in any event even if leave was required which this court wishes to reiterate there is no such requirement for a secured creditor, like the plaintiff, who was only enforcing its statutory right and remedy against the property, there is nothing to prevent the plaintiff from obtaining leave from the winding up court after having filed this originating summons in court. Leave may be obtained even if proceedings had been filed or commenced and not to treat proceedings as *ipso facto* to nullities as proceedings began without leave are curable by later grant of leave. (see *Re Saunders (a Bankrupt) Re Bearman (a Bankrupt)* [1997] 3 All ER 992), *Re Wanzer Limited* [1891] 1 Ch D 305 at p. 312)

It directs what ought to be done ... But it does not oblige the court to close the gates of mercy upon the applicant but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance is obtained at last

(*Rendal v. Blair* [1890] 45 Ch D 139 at p. 158) (see also *In Trusst and Guarantee Co Ltd v. Brenner* [1933] SCR 656 at p. 663, *Nazir Ahmad v. Peoples Bank of Northern India Ltd (In Liquidation)* [1942] (29) AIR (Lah) 189)

[18] Section 226(3)(a) of the Companies Act does not affect the power of any secured creditor to realise or otherwise deal with the security and the rights are protected and that there is no requirement to seek the leave of the winding up court for realising the security. In other words, the secured creditor stands outside the winding up proceedings unless he himself chooses to submit to the jurisdiction of the winding up court (see also *Padmavathamma & Ors v. Battepati Pasthasarathi* [1996] 4 Andh LT 272). A secured creditor cannot be deprived of his security until he has been paid in full. (see *Re Joint Stock Discount Company, Warrant Finance Company's* case No. 2 [1870] 10 Equity 11, *Re David Llyod & Company* [1877] 6 Ch D. 339 at p. 343 as referred to in *Ram Chand v. Bank for Celyer India, Limited Delhi & Another* [1922] Lahore 281, *Nrishinha Kumar Siha v. Deb Prosanna Mukherjee & Ors* AIR [1935] Col 460, *Koshi Bai & Another v. Chunilal Hathising & Other* AIR [1930] Bombay 11).

[19] As stated above, this court wishes to reiterate and is of the considered view that the s. 226(3)(a) of the Companies Act was not intended for the enforcement of a statutory right and remedy against the property charged to the plaintiff bank as the proceeding is not against the liquidator. If s. 226(3)(a) of the Companies Act was intended to cover and is insisted upon to be applied against a secured creditor, like the plaintiff bank, to enforce the statutory remedy on the security property, no bank or financial institution may be willing to grant banking or credit facilities to their potential customers if they would also be expected to rank *pari passu* and be in the queue with the other creditors. Consequently, and if the plaintiff bank had to be in the queue, and is to be repaid in accordance and rank *pari passu*, which in some cases may not be sufficient to satisfy the entire claim outstanding, obviously, it is not good for the country's economy and the financial institution. It may also adversely affect other potential customers who may be in need of financial assistance but may not be able to obtain the facility until the bank had recovered the whole outstanding sum. The bank may also be reluctant to grant banking facilities even with the security as the same will frustrate the financial institution who may not be able to recover

the entire loan or facilities granted to the customers and the possibility of the collapse of the banking sector cannot be ruled out and the safeguard given to a secured lender may be defeated or frustrated. It is the respected view of this court that s. 226(3)(a) of the Companies Act does not bind a secured creditor and there is no bar for a secured creditor, such as the plaintiff in the present case to enforce the statutory remedy without leave from the winding up court as the plaintiff did not institute any action or suit. (see also *Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor* [2010] 9 CLJ 637).

[20] As stated above, the only limitation that is imposed upon a secured creditor is that he must realise the security within six months from the date of the winding up order. Otherwise, the secured creditors' right to impose further interest cannot be included to the outstanding amount owing beyond the date of the Winding up order. (see s. 291(1) of the Companies Act 1965 read with s. 4(1) of the Civil Law Act 1956, s. 8(2A) and para. 9 of Schedule C and s. 42 of the Bankruptcy Act 1967 (see also *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793, followed in *United Overseas Bank (Malaysia) Bhd v. Andrew Lee Siew Ling* [2012] 3 CLJ 708. At the same time, the secured creditor cannot disregard in totality the order of the winding up court or the insolvency proceedings or to treat the winding up order as non-existence. The statutory rights or remedy only saves the power of the secured creditor to realise his security or otherwise deal as with it to recover the outstanding sum or the banking facilities on the security. (see *Padmavathamma & Ors v. Batteryati Parthasarathi* [1996] 4 Andh LT 272).

[21] In the circumstances and for the reasons stated above, this court is of the considered view that the s. 226(3)(a) of the Companies Act has no application whatsoever to a secured creditor who has the statutory right to commence foreclosure proceeding where in the present case, the plaintiff is merely enforcing its statutory remedy. In accordance with the rules of reasons and justice, the preliminary objection raised on behalf of the official receiver is dismissed. Accordingly, the plaintiff's originating summons is allowed with costs.